THE PLEA TO THE JURISDICTION.

In the recent case of Davidson *v.* Watts, 111 Va. 394, the court sustained the action of the lower court in striking out a plea to the jurisdiction because it was pleaded by attorney instead of in person; and the still later case, Culpeper National Bank *v.* Tidewater Improvement Company, Inc., 119 Va. 73, held a plea to the jurisdiction by the corporation defendant bad because pleaded in the name of the Culpeper National Bank, instead of in the name of the Culpeper National Bank, by its attorney.

Thus the plea in one case was bad because pleaded by attorney, and was bad in the other because it was not pleaded by attorney; though in both cases, of course, the pleas were actually filed by attorneys, and this was well known to both the lower and appellate courts: to the former, because the attorney was actually before the court; and to the latter, because the record showed that fact. It should be said at the outset that both decisions are in accord with common law authority.

The reason usually assigned for the rule applied in the case first mentioned—that an individual must plead to the jurisdiction in proper person—is, that to appear by attorney, who is an officer of the court, would be to admit the jurisdiction of the court. 4 Minor 3rd. Ed. 764; Burks' Pleading and Practice, Sec. 183. "In repudiating the court the officers of the court are necessarily repudiated; and in recognizing the officers of the court the jurisdiction of the court is submitted to." Shelby *v.* Johnson, 7 Humphrey 503.

A somewhat different reason for the rule is sometimes given. We must remember that an individual can appear in person or by attorney, Chitty's Pleading 16th Am. Ed. 577; but it is said that at an early period in the common law one could appear by attorney only after leave of court obtained. Wodell *v.* W. Va. Imp. Co., 38 W. Va. 23, 17 S. E. 386; Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850. Therefore "A plea to the jurisdiction must be signed by the defendant in person, for if signed by an attorney who is an officer of the court he is supposed to have signed by leave of the court, and the asking of leave is considered as a tacit admission of the jurisdiction." Kenney v. How-

ard, 67 Vt. 375, 31 Atl. 850. The same reason for the rule is given by Judge Holt in Woodell *v.* W. Va. Imp. Co., 38 W. Va. 23, 17 S. E. 386; and this is apparently the reason given in Davidson *v.* Watts, 111 Va. 394. In other words, if the plea is pleaded by attorney, the defendant must have first appeared in person and asked the leave of court to be represented by an attorney of that court. Such an appearance before the court amounts to a general appearance, which, according to the very familiar rule of present-day practice, is a waiver of all dilatory defenses, including an objection to the jurisdiction of the court.

If the latter be the true reason for the rule, then its existence at this time is, of course, unjustified. If the former be the true reason there is just as much reason for the rule today as there ever was. But an examination of the practice will show that it never was any more than a mere form, and the fact that it has survived to this day in any jurisdiction is remarkable. As no leave of court is required before one can be represented by attorney (and no such leave is required in this country and has not been required for centuries past in England, Stephen's Pleading, Andrews Ed. 510) it is difficult to understand how any court today can infer from the fact that a plea is pleaded by attorney that the defendant first made a general appearance and asked leave to be so represented. To heighten the absurdity of such an inference in Virginia, if possible, we need only remember that dilatory pleas here must be filed at rules.

Can the rule be better supported on the reason more frequently given—that an appearance by an attorney, he being an officer of the court, amounts to a submission to the court's jurisdiction? If there were any such rule actually enforced, we might quarrel with the rule as being unreasonable, but the plea would not be open to criticism, for it would be in accordance with the rule. The books, I believe, will be searched in vain for any statement to the effect that a defendant cannot have his plea to the jurisdiction prepared, filed, and tried by his attorney. Has any Virginia lawyer ever known a defendant to prepare, file, or try his own plea to the jurisdiction? Mr. Minor states the proposition very accurately, "The appearance must *purport* to be in person." It is a mere formula which carries

its falsity on its face, and yet it is allowed to affect a substantial right; for in spite of the stock denunciation of dilatory defenses, the right to be sued in the venue prescribed by law—usually the place of the defendant's residence—is justly regarded by the citizen, who knows nothing of the distinction between dilatory defenses and defenses in bar, as a valuable right. By what course of reasoning can we come to the conclusion that if the defendant's plea recites that he "comes by his attorney" it is bad because the judisdiction of the court is confessed, but that if he is careful to recite in his plea that he comes "in his own proper person" he does not admit the jurisdiction of the court, though his attorney draws the plea, affixes his signature to it, followed by the letters P. D., files it, appears in court and tries it? Surely it would seem that if one confesses the juridiction of the court by pleading by attorney, he would also do so by being actually represented in court by an attorney.

Let us examine the rule applied to the second of the two cases—that a plea to the jurisdiction by a corporation must be by attorney. It should first be said that, so far as common law authority is concerned, a corporation must always plead by attorney. It is not a rule which applies only to pleas to the jurisdiction. "A corporation aggregate which is incapable of a personal appearance must purport to appear by attorney." Chitty's Pleading, 16th Am. Ed. 577; 6 Thompson on Corporations, Sec. 7560, Osborne *v.* U. S. Bank, 9 Wheaton 738. Now when a corporation desired to plead to the jurisdiction of the court it found itself in a dilemma. It had no proper person; therefore, if it pleaded in that form the plea was demurrable. Nispel *v.* Western, etc., Co., 64 Ill. 311. If it pleaded by attorney, did it not confess the court's jurisdiction? An individual who so pleaded did. The courts met this by establishing the rule that a corporation pleads to the jurisdiction by attorney, just as it pleads any other matter. For, "As a corporation cannot appear but by attorney, to say that such an appearance would amount to a waiver of the objection would be to say that the party must from necessity forfeit an acknowledged right by using the only means which the law affords of asserting that right." Com-

mercial Bank *v.* Slocumb, 14 Peters 60; 6 Thompson on Corporations, Sec. 7628. It is to be noted, however, that Judge Green in Quarrier *v.* Peabody Insurance Co., 10 W. Va. 507, held firmly to the theory that a corporation would confess the jurisdiction of the court if it pleaded by attorney, and suggested that such a plea should be "by its president."

The principal thus established would seem to be that such a corporation is not affected by the technical rule applying to such a plea by an individual; but the courts take the position that another rule, equally technical, was prescribed to be followed by corporations. The fact is a corporation pleads to the jurisdiction just as it pleads any other defense, dilatory or in bar; and no reason can be assigned on principal why it should be held to any stricter requirement in the one class of pleas than in the other.

In the Virginia case, that part of the plea to the jurisdiction technically called the appearance, was as follows: "And the said defendant, the Culpeper National Bank, comes and says." The plea was signed in the Bank's name by its president with its seal attested by its secretary. Following this appear the names of counsel—Grimsley & Miller, P. D. The court held this plea properly stricken out because it was pleaded in person and not by attorney. It needed the magic words "by its attorney" in its commencement and without them was fatally defective.

If a corporation pleads to the jurisdiction "in its own proper person" the plea is demurrable though signed by its general superintendent, and its general attorney and solicitor. Nispel *v.* Western Union Railroad Co., 64 Ill. 311. Likewise such a plea "by its President and Secretary," signed in its name by the president, is bad, though also signed by the attorneys for the defendant. Nixon *v.* Southwestern Insurance Co., 47 Ill. 444.

But in an action brought by a corporation the defendant demurred because the declaration did not show that the plaintiff being a corporation, sued by attorney; and the demurrer was sustained; but the judgment was reversed on appeal, the court saying "It is true a corporation can only appear by attorney; but we think it manifest that the plaintiff did so appear in the

present case. The record states that the plaintiff by M. M. Ray, Esq., her attorney, filed in the Clerk's Office a declaration; and that the declaration is signed by the gentleman who filed it as attorney for the plaintiff. This is an appearance by attorney." State Bank *v.* Bell, 5 Blackford 127. It would seem that if the act of filing a declaration signed by counsel is an appearance by attorney, on principal the filing of a plea to the jurisdiction signed by counsel is an appearance by attorney also.

The Indiana court in the case just quoted from further says, "A corporation appears by attorney when it is represented by an attorney at law regularly admitted to practice at the bar, and such an appearance is evidence of the authority to do so." This certainly commends itself to one's common sense; but it seems that what the courts rigidly insist on is the formula in the commencement of the plea, "The defendant by its attorney," and refuse to be apprised of the fact that the corporation really appeared by attorney from any other source, though indisputable evidence of the fact that it did so appear is on the face of the pleading objected to.

Therefore, it is submitted that the rule applied to corporations has as little to commend it as the rule applied to individuals. Both are mere formulas; useless, michievous technicalities which the court of their own motion might have long ago discarded. They are mere practice details; and will contend that we have in force today all of the details of common law practice except those which have been removed by statute. Being Judge-made, can they not be Judge-destroyed when their usefulness, if any they ever had, has long since disappeared.

It is interesting in this connection to consider section 3269 of the Va. Code, which is as follows: "No formal defense shall be required in a plea. It shall commence as follows: 'The defendant says that. " 'The same section is found in the Code of 1849, Chapter 171 Sec. 28, where there is a marginal note indicating that it was taken from the Rules of the Judges made in conformity with the Statutes of 3 and 4 William IV, chap. 42, Sec. 1, commonly known as the Hilary Rules of 1834. It appears that this Code Section has never been construed by our Court of Appeals. Does the Statute apply to dilatory pleas,

or only to pleas in bar? Can any reason be assigned for restricting its application to the latter? It is to be noted that when, by another Code section, formal allegations are made unnecessary, the application of the statue is carefully restricted to "a plea, replication, or subsequent pleading, intended to be pleaded in bar, or in maintenance of the action." C. V. 3265. This provision is taken from Hilary Rules also—See Sec. 9.

The section first mentioned contains no such restriction; in its terms it applies to all pleas, and prescribes how all pleas shall commence. Therefore, but for the fact that the Court of Appeals has, in effect decided otherwise, the natural conclusion would be that the formal commencement to a plea to the jurisdiction had been abolished in Virginia for nearly seventy years.

An examination of the Hilary Rules (See Chitty's Pleading 16th Am. Ed. 752) shows that the section of our Code of 1849 was taken from Rule 10 which is as follows: "No formal defense shall be required in a plea, and shall commence as follows: The said defendant, by —— his attorney, (or in person, etc.) says that." It is at once seen that the form adopted in Virginia is even simpler than its English model, in that it does not require the recital "by attorney" or "in person." Chitty says, referring to Rule 10, "It has been considered that this rule extends to pleas in abatement as well as pleas in bar, and all other pleas." 16th Am. Ed., Vol. 1, p. 445, note. The West Virginia Code, Chap. 126, Sec. 26; Hoggs Code, Sec. 4780, is identical with our code, section 3269. In Woodell *v.* W. Va. Imp. Co., 38 W. Va. 23, 17 S. E. 386, Judge Holt, in an able and careful opinion holds that the statute applies to pleas to the jurisdiction as well as pleas in bar, and that the technical commencement of a plea to the jurisdiction is no longer necessary. He says, "There is nothing in the letter of Sec. 26 which excludes such a plea to the local jurisdiction of the Court any more than a plea in bar, for, say, want of jurisdiction of the subject matter —— and we can see no reason why the defendant corporation should not be within the meaning of the rule, nor why it should not comprehend such pleas as well as pleas in bar." Is it not to be regretted that the Virginia Court has not seen fit to put a similar construction on the statute in this

State? Surely such a holding would have been in the furtherance of simple, efficient procedure.

It is not proposed here to discuss further the technical structure of pleas to the jurisdiction or in abatement generally. Everyone is familiar with the rule that dilatory pleas must be good in form as well as in substance, as they are not favored, and the strict technicality of the common law still prevails as to the form of dilatory pleas. See Burks' Pleading and Practice. p. 269.

It may be interesting, however, to note briefly how the dilatory plea has fared in other jurisdictions. In England it is provided by Rules of Court, Order XIX, Sec. 13—"No plea or defense shall be pleaded in abatement."

In practically all of what are known as the Code States the dilatory plea has been abolished; and dilatory defenses are made by demurrer, answer, or motion. Phillips Code Pleading Sec. 237; 31 Cyc. pp. 128, 180. The Michigan Judicature Act of 1915 abolishes pleas in abatement and pleas to the jurisdiction, and substitutes motion therefor; though in that State matters in abatement have long been pleadable by way of notice under the general issue. 14 Mich. Law Review, 557. In New Jersey the Rules of the Supreme Court which went into effect Sept. 1, 1913 (Rule 56) provide: "Pleas to the jurisdiction and pleas in abatement are abolished. In lieu thereof objection shall be made on motion." In the Federal Courts, on the Equity side, the dilatory plea has ceased from troubling, for by Rule 29 pleas are abolished, and "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer."

Thus we see that the dilatory plea is an outlaw from the land of its birth; that in a great many of our states it is unknown; that two of the latest states to adopt Codes of Procedure have discarded it; and it is banished from all Federal Equity Courts. In Virginia we have done something of the same sort on a small scale, for it is now provided (C. V. 3258): "No plea in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration may, on the defendant's

motion, and on affidavit of the right name, be amended by inserting the right name." And while our statute (C. V. 3259) provides that a defendant shall not take advantage of any defect in the writ or return unless the same be pleaded in abatement, yet a preliminary motion to quash the writ or return for irregularity is a detail of practice familar to every Virginia lawyer; and our Court of Appeals has said that it is "well settled that if process be illegally issued or executed the validity of such process or return can be raised by a motion to quash as well as by plea in abatement." Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857; Graves Notes on Pleading (new) p. 47, Note 2.

If these defects, which according to orthodox common law practice should be pleaded in abatement, can be satisfactorily disposed of on motion, can any reason be assigned why lack of jurisdiction in the court, variance between the writ and declaration, another action pending, misjoinder of a party, or any other ground for dilatory plea, can not also be made and satisfactorily disposed of on motion? The suggestion that if dilatory objections are taken by motion, the defendant will not give the plaintiff a better writ, is met and disposed of by the fact that a plea in abatement to which this rule universally applies is that for a misnomer; for in such plea the defendant must always state what his true name is; and yet the abolition of the plea in abatement to this error and the substitution of motion therefor seems not to have caused the slightest inconvenience. Does it not follow that the plaintiff can be given a better writ when any other dilatory objection is taken by motion?

When we consider that the tendency of the times is toward simple, efficient, and common-sense procedure; that the dilatory plea is loaded down with technicalities, the reason for which, and the usefulness of which, have long since departed, should we not do well to abolish it altogether and substitute therefor the preliminary motion?

W. H. MORELAND.

Lexington, Va.